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PENANG PORT COMMISSION

v.

KANAWAGI SEPERUMANIAM

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COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NOS: W-02-715-01 & W-02-95-2001]

C

5 SEPTEMBER 2008

CIVIL PROCEDURE: *Action - Multiplicity of actions - Whether plaintiff's triable issue in writ action pending hearing and plaintiff's originating summons filed sought order in identical terms - Whether abuse of court's process - Rules of the High Court 1980, O. 18 r. 19*

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The plaintiff commenced a writ action against the defendant, *inter alia*, for the following prayers: (1) a declaration that the defendant's termination of the plaintiff's employment as a traffic supervisor was null and void; (2) a declaration that the plaintiff obtained a pass in the Bahasa Malaysia paper at the SPM examination of 1976 and should therefore be confirmed as a traffic supervisor; and (3) damages. Subsequently, the plaintiff applied and obtained summary judgment under O. 14 of the Rules of the High Court 1980 ('RHC') against the defendant. The defendant appealed but only against prayer 2 that was granted to the plaintiff. The deputy registrar ('DR') assessed damages under prayer 3 and awarded a sum of RM2,274,151.42 to the plaintiff. The Court of Appeal ('CA1') allowed the defendant's appeal and set aside the High Court order on plaintiff's prayer 2 and ordered an early trial thereof on the grounds that it was a question which had to be tried by the High Court and thus a triable issue. Also, by way of a consequential order, the CA1 set aside the DR's assessment of damages. The plaintiff's application for leave to appeal to the Federal Court was struck out. The plaintiff then filed a summons-in-chambers to set aside the CA1's order but that was dismissed with costs. Some four years later, the plaintiff filed an application to the Court of Appeal ('CA 2') to vary CA1's order and that was allowed. The defendant then obtained leave to appeal to the Federal Court on the following question of law, *ie*, whether CA2 had the jurisdiction to set aside an order by

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CA1. The Federal Court answered in the negative and reinstated the CA1's order relating to the triable issue. Hence, that triable issue was pending hearing in the plaintiff's writ action in the High Court. Before the High Court could proceed with the hearing of the triable issue in the writ action, the plaintiff filed a separate and distinct originating summons ('OS') at the High Court and obtained an order without any trial, but by way of affidavits only, confirming the plaintiff in the post as traffic supervisor. The High Court dismissed the defendant's application to strike out the plaintiff's OS under O. 18 r. 19 RHC. The defendant now appealed against the judgment for the plaintiff given in the OS and the dismissal of its application to strike out the plaintiff's OS. Hence, the defendant's two appeals herein.

Held (allowing the appeals)
Per Low Hop Bing JCA:

(1) The CA1's order relating to the triable issue in the plaintiff's writ action ought to have been complied with by the plaintiff. The triable issue had to be heard and determined by the High Court wherein the plaintiff's oral evidence in chief had to be adduced, cross-examined and re-examined. The plaintiff must therefore take all necessary steps in his writ action to give effect to the order of CA1. The plaintiff was certainly not at liberty to file his OS in defiance of the order of CA1, particularly when the issue in the plaintiff's OS and the triable issue in the plaintiff's writ action were identical. To do so would clearly constitute multiplicity of actions. (paras 19)

(2) The factual background to the appeals provides a plain an obvious case for multiplicity of actions. The existence of the plaintiff's writ action and the plaintiff's OS touching on an identical issue ran counter to the *bona fide* doctrine. It militated against public policy and the interests of justice. The multiplicity of actions was an abuse of the process of the court that came within the purview of O. 18 r. 19(1)(d) RHC. (para 22)

(3) The learned trial judge had misdirected himself in giving an order in terms of the plaintiff's OS without any trial, but by way of affidavits only when an issue identical to the triable issue as ordered by CA1 was pending hearing in the High Court. (para 24)

A **Per Abdul Malik Ishak JCA:**

(1) The triable issue had not been heard in the court. The plaintiff should have initiated the necessary steps to have the triable issue heard before the High Court. When the plaintiff
B filed the OS in defiance of the earlier order of this court, he was inviting the defendant to cite him for contempt. (para 38)

(2) The OS with the triable issue in the plaintiff's writ action that was awaiting trial at the High Court gave rise to a multiplicity of actions and that would in turn amount to an abuse of the
C process of the court. (para 40)

(3) The learned judge erred when he gave an order in terms of the plaintiff's OS without the benefit of a full trial but rather by way of an affidavit evidence notwithstanding that the
D Court of Appeal earlier ordered that the triable issue should proceed to trial before the High Court. (para 55)

[High Court's orders in plaintiff's OS set aside and OS struck out under O. 18 r. 19(1)(d) RHC 1980. Plaintiff to refund to defendant sum of
E *RM2,274,151.42 with interest at 8% per annum. Triable issue in plaintiff's writ action to be heard and determined in High Court in compliance with CA1's order.]*

Bahasa Malaysia *Translation Of Headnotes*

F Plaintif memulakan tindakan writ terhadap defendan antara lain bagi menuntut perkara-perkara berikut: (1) satu deklarasi bahawa penamatan kerja plaintif sebagai seorang penyelia trafik oleh defendan adalah batal dan tak sah; (2) satu deklarasi bahawa plaintif telah lulus ujian kertas Bahasa Malaysia dalam peperiksaan
G SPM 1976 dan kerana itu harus disahkan dalam jawatannya sebagai penyelia trafik; dan (3) gantirugi. Berikutnya plaintif memperoleh penghakiman terus di bawah A. 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap defendan. Defendan merayu tetapi hanya terhadap permohonan (2) plaintif yang telah
H dibenarkan. Sementara itu, Timbalan pendaftar ('TP') telah mentaksir gantirugi di bawah permohonan (3) dan mengawardkan RM2,274,151.42 kepada plaintif. Mahkamah Rayuan ('MR1') bagaimanapun telah membenarkan rayuan defendan dan berikutnya mengenepikan perintah Mahkamah Tinggi berkaitan permohonan
I (2) plaintif dan memerintahkan perbicaraan awal baginya atas

alasan ia merupakan satu isu boleh dibicarakan yang harus diputuskan oleh Mahkamah Tinggi. Selain itu, melalui satu perintah konsekuental, MR1 mengenepikan taksiran gantirugi yang dibuat oleh TP. Plaintif memohon izin untuk merayu ke Mahkamah Persekutuan tetapi permohonan itu ditolak. Plaintif kemudian memfail saman dalam kamar bagi mengenepikan perintah MR1 tetapi itu juga ditolak dengan kos. Lebih kurang empat tahun kemudian, plaintif memfail permohonan ke Mahkamah Rayuan ('MR2') bagi meminda perintah MR1 dan permohonan tersebut dibenarkan. Selaras dengan itu, defendan memohon dan diberi izin untuk merayu ke Mahkamah Persekutuan atas persoalan undang-undang berikut, iaitu, sama ada MR2 mempunyai bidangkuasa untuk mengenepikan perintah yang dibuat oleh MR1. Mahkamah Persekutuan menjawab persoalan dalam bentuk negatif sekaligus mengembalikan perintah MR1 berkaitan isu boleh dibicarakan. Akibatnya, isu boleh dibicarakan tersebut telah ditetapkan untuk didengar dalam tindakan writ plaintif di Mahkamah Tinggi. Bagaimanapun, sebelum Mahkamah Tinggi dapat mendengar isu boleh dibicarakan dalam tindakan writ ini, plaintif memfail pula saman pemula yang berasingan ('SP') di Mahkamah Tinggi dan memperoleh, tanpa apa-apa perbicaraan dan hanya melalui keterangan afidavit sahaja, satu perintah mengesahkan jawatan plaintif sebagai seorang penyelia trafik. Mahkamah Tinggi juga menolak permohonan defendan untuk membatalkan SP plaintif di bawah A. 18 k. 19 KMT. Defendan kini merayu terhadap keputusan yang berpihak kepada plaintif yang diberi di dalam SP serta keputusan menolak permohonan defendan untuk membatalkan SP. Maka itu terdapat dua rayuan oleh defendan di sini.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Low Hop Bing HMR:

(1) Perintah MR1 berkaitan isu boleh dibicarakan dalam tindakan writ plaintif sepatutnya dipatuhi oleh plaintif. Isu boleh dibicarakan itu harus didengar dan diputuskan oleh Mahkamah Tinggi di mana keterangan utama plaintif perlu dikemukakan, diperiksa balas dan diperiksa semula. Dengan kata lain, di dalam writnya, plaintif harus mengambil segala langkah perlu bagi memberi kesan kepada perintah MR1. Plaintif tidak mempunyai kebebasan untuk memfailkan SPnya dengan

membelakangkan perintah MR1, sementelah kedua-dua isu, iaitu isu di dalam SP plaintif dan isu boleh dibicarakan di dalam tindakan writ, merupakan isu yang sama. Berbuat seperti yang dibuat plaintif bererti menggandakan tindakan.

(2) Latarbelakang fakta rayuan-rayuan jelas menunjuk kepada satu kes penggandaan tindakan. Kewujudan tindakan writ dan SP plaintif yang berkait dengan isu yang sama adalah bertentangan dengan doktrin *bona fide*. Ia berlawanan dengan polisi awam dan kepentingan keadilan. Kepenggandaan tindakan adalah juga satu salah guna proses mahkamah dan terangkum ke dalam lengkongan A. 18 k. 19(1)(d) KMT.

(3) Yang arif hakim bicara telah tersalah arah akan dirinya dalam memberi perintah menurut terma SP plaintif tanpa apa-apa perbicaraan dan hanya berdasarkan keterangan afidavit semata-mata, memandangkan satu isu yang serupa dengan isu boleh dibicarakan seperti yang diperintahkan MR1 masih menunggu perbicaraan di Mahkamah Tinggi.

Oleh Abdul Malik Ishak HMR:

(1) Isu boleh dibicarakan telah tidak didengar di mahkamah. Plaintif sepatutnya mengambil langkah-langkah perlu bagi membolehkan isu boleh dibicarakan didengar di hadapan Mahkamah Tinggi. Apabila plaintif memfailkan SP dan membelakangkan perintah terdahulu mahkamah ini, beliau telah menjemput defendan untuk mendakwanya kerana menghina mahkamah.

(2) SP dan isu boleh dibicarakan dalam tindakan writ yang menunggu perbicaraan di Mahkamah Tinggi telah menyebabkan penggandaan tindakan, sekaligus membawa kepada salah guna proses mahkamah.

(3) Yang arif hakim khilaf apabila memberi perintah menurut terma SP plaintif tanpa manfaat perbicaraan penuh dan dengan hanya bergantung kepada keterangan afidavit sahaja, walaupun terdapat perintah terdahulu Mahkamah Rayuan supaya isu boleh dibicarakan itu dibicarakan di hadapan Mahkamah Tinggi.

[Perintah Mahkamah Tinggi dalam SP plaintif diketepikan dan SP dibatalkan di bawah A. 18 k. 19(1)(d) KMT 1980. Plaintif hendaklah mengembalikan kepada defendan jumlah RM2,274,151.42 dengan faedah pada kadar 8% setahun. Isu boleh dibicarakan dalam tindakan writ plaintif hendaklah didengar dan diputuskan di Mahkamah Tinggi selaras dengan perintah MR1.]

Case(s) referred to:

Connelly v. Director Of Public Prosecutions [1964] 2 All ER 401 ***(refd)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1987] 1 CLJ 438; [1987] CLJ (Rep) 1 PC ***(refd)***

Director of Public Prosecutions v. Humphrys [1976] 2 All ER 497 ***(refd)***

Earl Poulett v. Viscount Hill [1893] 1 Ch 277 ***(refd)***

Ebert v. Venvil And Another, Ebert v. Birch And Another [1999] 3 WLR 670 ***(refd)***

Gabriel Peter & Partners v. Wee Chong Jin & Ors [1998] 1 SLR 374 ***(refd)***

Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 2) [2002] 6 CLJ 6 HC ***(refd)***

Goldsmith v. Sperrings Ltd [1972] 2 All ER 566 ***(refd)***

Grafton Isaacs v. Emery Robertson [1985] 1 AC 97 ***(refd)***

Hadi Hassan v. Suria Records Sdn Bhd [2005] 3 MLJ 522 ***(refd)***

Hui Chi-ming v. R [1991] 3 All ER 897 ***(refd)***

Indah Desa Saujana Corporation Sdn Bhd & Ors v. James Foong Cheng Yuen & Anor [2008] 1 CLJ 651 CA ***(refd)***

Isaacs v. Robertson [1984] 3 All ER 140 ***(refd)***

Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd [1999] 4 CLJ 533 CA ***(refd)***

Lai Kim Loi v. Dato Lai Fook Kim & Co [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Mohamed Yusop Abdul Wahab v. American Express (M) Sdn Bhd [2002] 7 CLJ 81 HC ***(refd)***

Morris And Others v. Crown Office [1970] 2 QB 114 ***(refd)***

Morris And Others v. The Crown Office [1970] 1 All ER 1079 ***(refd)***

Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653 ***(refd)***

Ng Kian Chong & Ors v. Saw Seng Kee [1994] 4 CLJ 857 ***(refd)***

Searle v. Choat [1884] 25 Ch D 723 ***(refd)***

Smith v. Linskills a firm and Another [1996] 2 All ER 353 ***(refd)***

Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Williams v. Hunt [1905] 1 KB 512 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 181
Rules of the High Court 1980, O. 18 r. 19

For the appellant/defendant - Gurbachan Singh (Fadzil Abdullah & Nicholas Tan with him); M/s Lim Huck Aik & Co
For the respondent/plaintiff - Kanawagi Seperumaniam (Ravindra Nanukuttan with him)

[Appeal from High Court, Kuala Lumpur; Originating Summons No: R2-24-5-2000]

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing JCA:

Appeals

[1] Two related appeals have been lodged by the appellant ("the defendant") against two decisions of the Kuala Lumpur High Court. They are tabulated below:

Appeal No:	Order Appealed Against
W-02-715-2001	Judgment for respondent ("plaintiff") in originating summons R2-24-5-2000 ("plaintiff's originating summons").
W-02-95-2001	Dismissal of appellant's (defendant's) application to strike out plaintiff's originating summons under O. 18 r. 19 of the Rules of the High Court 1980.

A reference hereinafter to an order and a rule is a reference to that order and rule in the Rules of the High Court 1980.

Factual Background

[2] The events leading to these appeals evince a chequered history.

[3] In 1987, the plaintiff commenced Kuala Lumpur Civil Suit No. S6-22-208-87 ("the plaintiff's writ action") against the defendant seeking, *inter alia*:

(1) a declaration that the defendant's termination of the plaintiff's employment as a traffic supervisor on 7 May 1987 was null and void ("prayer 1"); A

(2) a declaration that the plaintiff has obtained a pass in the Bahasa Malaysia paper at the Sijil Pelajaran Malaysia examination of 1976 and should therefore be confirmed in the post as traffic supervisor ("prayer 2"); and B

(3) damages ("prayer 3").

[4] Some seven years later, on 14 February 1994, the plaintiff C applied for summary judgment under O. 14 in the plaintiff's writ action.

[5] On 18 July 1994, the plaintiff succeeded in obtaining summary judgment in terms of prayers 1 and 3 only, against which D the defendant has preferred no appeal.

[6] On 20 October 1994, the plaintiff obtained an order in terms of prayer 2. Against this order, the defendant filed an appeal *vide* Court of Appeal, Civil Appeal No. W-02-252-1994 ("CA 252 of 1994"). E

[7] On 24 October 1994, the deputy registrar of the High Court assessed damages under prayer 3 and awarded a sum of RM2,274,151.42. Against this assessment, the defendant filed an appeal to judge in chambers but this appeal was not heard. On F 19 December 1994, the plaintiff garnished the assessed damages. Consequently, the defendant paid the aforesaid sum to the plaintiff. The defendant then appealed *vide* Court of Appeal, Civil Appeal No. W-03-16-1994 ("CA 16 of 1994").

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[8] On 26 February 1997, the Court of Appeal ("CA Coram 1") allowed defendant's appeal in CA 252 of 1994, and set aside the High Court order on plaintiff's prayer 2 and ordered an early trial of prayer 2 in the plaintiff's writ action ie the declaration, that the plaintiff has obtained a pass in the Bahasa Malaysia paper at the H Sijil Pelajaran Malaysia examination of 1976 and should therefore be confirmed in the post as traffic supervisor, is a question which has to be tried by the High Court ("the triable issue").

[9] On 27 February 1997, in relation to CA 16 of 1994, CA I Coram 1, by way of consequential order, set aside the deputy registrar's assessment of damages. On 17 March 1997, the plaintiff vide notice of motion No. 08-18-1997 applied for leave to appeal

A to the Federal Court against this consequential order. However, on 11 June 2002, the plaintiff withdrew his notice of motion which was then struck out.

[10] On 15 September 1997, the plaintiff filed summons in B chambers seeking to set aside CA Coram 1's order given on 26 February 1997. On 2 March 2001, plaintiff's summons in chambers was dismissed with costs.

[11] Some four years later, on 1 August 2001, the plaintiff filed a notice of motion in the Court of Appeal ("CA Coram 2") C seeking to vary CA Coram 1's order made on 26 February 1997. On 30 April 2002, CA Coram 2 allowed plaintiff's notice of motion and varied CA Coram 1's order.

[12] On 29 August 2005, the defendant *vide* Federal Court notice D of motion No. W-08-40-2002 obtained leave to appeal to the Federal Court, on the following question of law:

> Whether a Coram of the Court of Appeal (CA Coram 2) has jurisdiction to set aside an order made by an earlier Coram of the E Court of Appeal (CA Coram 1)?

[13] That appeal, subsequently filed by the defendant *vide* Federal Court Civil Appeal No. W-02-21-2005, was heard by the Federal Court on 30 October 2007. Defendant's appeal was allowed by the Federal Court which gave the answer in the negative, and F reinstated CA Coram 1's order relating to the triable issue. Hence, that triable issue was pending hearing in the plaintiff's writ action in the High Court.

[14] Before the High Court could proceed with the hearing of G the triable issue in the plaintiff's writ action, the plaintiff, *vide* a separate and distinct action ie Kuala Lumpur originating summon No.R2-24-5-2000 (the plaintiff's originating summons), obtained an order from the High Court on 16 January 2001, confirming the plaintiff in the post as traffic supervisor (identical to prayer (2) H which was the triable issue pending hearing in the plaintiff's writ action) with all emoluments and allowances as if he had been in continued employment. The High Court also dismissed the defendant's application to strike out the plaintiff's originating summons under O. 18 r. 19 (collectively, "the orders in the I plaintiff's originating summons").

[15] Hence, the defendant's two appeals herein.

Abuse Of Process

[16] The defendant through Mr. Gurbachan Singh (Mr. Fadzil Abdullah and Mr. Nicholas Tan with him) ventilated that the plaintiff's conduct in filing the plaintiff's originating summons amounts to multiplicity of proceedings and is clear defiance of CA Coram 1's order relating to the triable issue and the setting aside of the deputy registrar's assessment of damages and so is an abuse of the process of the court. In support, reference was made to, *inter alia*, *Lai Kim Loi v. Dato Lai Fook Kim & Co* [1989] 2 CLJ 107; [1989] 1 CLJ (Rep) 61 SC.

[17] The plaintiff together with his learned counsel Mr. Ravindra Nanukuttan submitted at great length, *inter alia*, that the learned judge had not misdirected himself in giving the orders in the plaintiff's originating summons. However, in relation to the plaintiff's writ action, specifically the triable issue and the setting aside of the deputy registrar's assessment of damages, I am unable to find any submission.

[18] After a careful consideration of the aforesaid contentions, I am of the view that the question for disposal in the two appeals herein may be formulated as follows:

> In the face of the Federal Court order reinstating the order of CA Coram 1 in relation to the triable issue in the plaintiff's writ action and the consequential order of CA Coram 1 which set aside the deputy registrar's assessment of damages, is the filing of the originating summons by the plaintiff and the obtaining of an order in terms identical to the triable issue, in the absence of a trial, and merely on the basis of affidavits, an abuse of the process of the court under O. 18 r. 19(1)(d) of the Rules of the High Court 1980?.

[19] The salient and crucial point in the plaintiff's writ action is to be found in the order of CA Coram 1 relating to the triable issue and the setting aside of the deputy registrar's assessment of damages. In my view, CA Coram 1's order relating to the triable issue in the plaintiff's writ action ought to have been complied with by the plaintiff. The triable issue has to be heard and determined by the High Court, wherein the plaintiff's oral evidence in chief has to be adduced, cross-examined and re-examined. The plaintiff must therefore take all necessary steps in his writ action to give effect to the order of CA Coram 1. The

A plaintiff is certainly not at liberty to file his originating summons in defiance of the order of CA Coram 1, particularly when the issue in the plaintiff's originating summons and the triable issue in the plaintiff's writ action are identical. To do so would clearly constitute multiplicity of actions.

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[20] An authoritative illustration of multiplicity of actions may be found in *Lai Kim Loi, supra*. There, on 14 August 1985, the petitioner presented a petition intituled "Companies Winding-up No. 6 of 1985" for the winding-up of the second respondent C company. The petitioner also alleged acts by the first respondent which showed oppressive conduct under s. 181 of the Companies Act 1965. On 15 August 1985, the petitioner also filed a writ of summons and statement of claim against the first respondent in which substantially the same facts were averred as those stated in D the petition and praying for substantially similar relief. Subsequently, the first respondent applied for an order that the petition be struck out on the ground, *inter alia*, that the petition is an abuse of the process of the court. The learned judge of the High Court sustained that ground, and made an order that the E petition be struck out. On appeal, the decision of the High Court was affirmed by the then Supreme Court through the judgment of Gunn Chit Tuan SCJ (later CJ (M)).

[21] On the issue of abuse of the process of the court, I have F the occasion to deliver a unanimous judgment for this court, in *Indah Desa Saujana Corporation Sdn. Bhd & Ors v. James Foong Cheng Yuen & Anor* [2008] 1 CLJ 651, at pp. 681-682 para [81] to [84]. Where relevant, I dealt with the issue as follows:

> **Abuse Of The Process**
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> [81] The court has an inherent jurisdiction to prevent an abuse of its process: *Raja Zainal Abidin bin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 (SC).
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> H [82] Illustrations of an abuse of the process of the court include:
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> (a) an intention to embarrass the defendant: *Ansa Teknik (M) Sdn. Bhd v. Cygal Sdn. Bhd* [1989] 1 LNS 26; or
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> (b) where the process of the court has not been used in a *bona* I *fide* manner and has been abused: *Hadi bin Hassan v. Suria Records Sdn. Bhd* [2004] 8 CLJ 225.

[83] The categories of abuse of process of the court are never closed and will certainly proliferate pursuant to the myriad of circumstances available from the factual matrix found in each particular case.

[84] In *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin* [1988] 1 SLR 374 at p. 384, the Singapore Court of Appeal explained the scope of "an abuse of the process of the court" under O. 18 r. 19(1)(d) which is in *pari materia* with ours. The term has been given a wide interpretation by the courts and includes considerations of public policy and the interests of justice. It signifies that the process of the court must be used *bona fide* and properly and must not be abused".

[22] Reverting to the two appeals herein, the factual background unfolded at the outset of this judgment provides a plain and obvious case for multiplicity of actions. The existence of the plaintiff's writ action and the plaintiff's originating summons touching on an identical issue certainly runs counter to the *bona fide* doctrine. It militates against public policy and the interests of justice. This multiplicity of actions is plainly an abuse of the process of the court, which comes within the purview of O. 18 r. 19(1)(d) and must be treated as such: see also *Hadi bin Hassan, supra*, at p. 545 para [58] HC, per Abdul Malik Ishak J (now JCA).

[23] The plaintiff has additionally embarked on other areas of law in his 76-page written submission which I have given my most anxious consideration. I am of the view that, subject to the evidence to be adduced at the hearing of the triable issue in the High Court, that submission may well be relevant and applicable elsewhere, but certainly not in relation to the above question for determination. While I wish to commend the plaintiff for the enormous efforts expended by him, I am constrained to stress that his submission on those areas is not supportive of his case in the two appeals herein.

[24] The learned judge of the High Court has indeed misdirected himself in giving an order in terms of the plaintiff's originating summons without any trial, but by way of affidavits only, when an issue identical to the triable issue, as ordered by CA Coram 1, is pending hearing in the High Court.

A

Conclusion

[25] On the foregoing grounds, my answer to the above question is in the affirmative.

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[26] That being the case, in these two appeals, the orders shall be as follows:

(1) the defendant's two appeals are allowed with costs here and below;

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(2) the orders of the High Court in the plaintiff's originating summons are set aside; and substituted with an order that the plaintiff's originating summons be struck out under O. 18 r. 19(1)(d);

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(3) the plaintiff is to refund to the defendant the aforesaid sum of RM2,274,151.42, with interest at 8% per annum with effect from 28 February 1997 to the date of realisation, within 14 days next after the service of the order of this court on the plaintiff;

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(4) the triable issue in the plaintiff's writ action shall be heard and determined in the High Court in compliance with the order of CA Coram 1; and

(5) deposit is to be refunded to the defendant.

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[27] My learned brother, Sulaiman bin Daud, JCA has read this judgment in draft and has expressed his concurrence with it.

[28] I now invite my learned brother Abdul Malik bin Ishak, JCA to deliver his well-considered written judgment.

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Abdul Malik Ishak JCA:

Introduction

[29] The facts relevant to these two appeals *vide* Civil Appeal No: W-02-715-2001 and Civil Appeal No: W-02-95-2001 have been set out *in extenso* by my learned brother Low Hop Bing, JCA in his well written judgment. I am thus spared the ordeal of regurgitating the facts, once again.

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[30] What is of importance is that the triable issue has not been heard before the High Court. And that triable issue relates to the plaintiff's (respondent's) writ action *vide* Kuala Lumpur Civil Suit No: S6-22-208-87 against the defendant (appellant) in relation to the second prayer, namely:

> a declaration that the plaintiff has obtained a pass in the Bahasa Malaysia paper at the Sijil Pelajaran Malaysia examination of 1976 and should therefore be confirmed in the post as traffic supervisor.

[31] In this judgment, for ease of reference, I shall refer the parties like what they were referred to in the High Court. Thus, the respondent (Kanawagi s/o Seperumaniam) shall be referred to as the plaintiff. While the appellant (Penang Port Commission), on the other hand, shall be referred to as the defendant.

To The Heart Of The Matter

[32] Even before the High Court could proceed with the hearing of the triable issue, the plaintiff saw it fit to file a separate and distinct action *vide* Kuala Lumpur originating summons number R2-24-5-2000.

[33] By this originating summons, the plaintiff succeeded in obtaining an order from the High Court on 16 January 2001. That order brought with it dire consequences for the defendant. The order confirmed the plaintiff in the post as the traffic supervisor – which was in fact the triable issue which was not heard as yet. The order also gave all the emoluments and allowances to the plaintiff as if the plaintiff had been in continued employment of the defendant. The High Court also dismissed the defendant's application to strike out the plaintiff's originating summons under O. 18 r. 19 of the Rules of the High Court 1980.

[34] By filing the originating summons *vide* Kuala Lumpur originating summons number R2-24-5-2000, the plaintiff had succeeded in pre-empting the hearing of the triable issue notwithstanding the order of this court dated 26 February 1997 which ordered an early trial of the triable issue.

[35] It seems to me that the plaintiff is thumbing at the order of this court dated 26 February 1997. That cannot be condoned by this court.

[36] It is trite law that "a person against whom an order of court has been issued is duty bound to obey that order until it is set aside" (per Abdul Hamid Omar, Lord President, in *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210, SC). It follows therefore that where a party disobeys an order, even if it is an irregular order, which has not been set aside, that party runs the risk of being committed for contempt (*Grafton Isaacs v. Emery Robertson* [1985] 1 AC 97, PC, and *Isaacs v. Robertson* [1984] 3 All ER 140, PC; and *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor*. [1987] 1 CLJ 438; [1987] CLJ (Rep) 1, PC).

[37] It must be recalled that on 30 October 2007, the Federal Court heard the appeal filed by the defendant *vide* Federal Court Civil Appeal No: W-02-21-2005 and the Federal Court re-instated the order of this court dated 26 February 1997. This meant that the Federal Court agreed that the hearing of the triable issue should be heard in the High Court and this has not been done.

[38] The gravamen of the matter is this. The triable issue has not been heard in the High Court. With respect, the plaintiff should initiate the necessary steps to have the triable issue heard before the High Court. When the plaintiff filed the originating summons number R2-24-5-2000 in defiance of the order of this court dated 26 February 1997, he is inviting the defendant to cite him for contempt.

[39] Contempt by disobedience is quite common in our courts. Disobeying court orders would carry dire consequences to the contemnors: from a fine to the sanction of imprisonment. Lord Denning MR in *Morris And Others v. Crown Office* [1970] 2 QB 114 at 122, and in *Morris And Others v. The Crown Office* [1970] 1 All ER 1079 at 1081 rightly observed that:

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without trial – but it is a necessary power.

[40] Be that as it may, multiplicity of actions are reflected here. The originating summons number R2-24-5-2000 with the triable issue in the plaintiff's writ action that is awaiting trial at the High Court do not go well together and they give rise to multiplicity of actions and that would in turn amount to an abuse of the process of the court.

[41] There is a rule against multiplicity of proceedings. It is housed in the Courts of Judicature Act 1964, particularly the Schedule thereto, at para 11 which reads as follows:

> **11. *Res judicata***
>
> Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

[42] Cotton LJ in *Searle v. Choat* [1884] 25 Ch D 723 at p. 727 made reference to the English legislation and said that the whole tenor of the Judicature Acts was to require that all proceedings, as far as possible, are to be taken in one action.

[43] Lindley LJ in *Earl Poulett v. Viscount Hill* [1893] 1 Ch. 277, CA, at pp. 280 to 281 aptly said:

> In this case the learned Judge has made a mistake which is attributable to a wish to save costs. On the 26th of May, 1891, the Plaintiffs commenced against the Defendant an action for foreclosure, and by the writ they claimed not only foreclosure but also, as the practice has been since the passing of the Judicature Acts, a personal order for payment. Under that writ an account of what is due would be directed – an account which, being taken on the footing on which such accounts were always taken in Chancery, would include interest down to the date of the certificate, and an order would be made for personal payment of the amount found due. Before the Judicature Acts a personal order for payment could only be obtained by bringing a common law action, in which interest could only be recovered down to the date of the writ, and a personal order for payment of the subsequent interest could only be obtained by a fresh action; but now that a personal order can be obtained for payment of what is found due on taking the account, such second action is unnecessary. In *Farrer v. Lacy, Hartland & Co* 31 Ch. D 42, 51, the form of judgment is given which was settled by the Court of Appeal.

> Whether this particular point was present to the mind of the Court is not quite clear; but a general form was settled giving a personal order for payment of what was found due for principal and interest on taking an account, so that the necessity for a subsequent action for interest is taken away. The Plaintiffs then could in the first action have obtained a personal order for payment of all that was due to them for principal and interest, and the present action is unnecessary. If we were to affirm the order under appeal our decision would lead to bringing improper and vexatious actions; and, though I believe that the attempt to recover in the present action was well meant, it was a mistake.

[44] Collins MR in *Williams v. Hunt* [1905] 1 KB 512, CA, was confronted with an application by the defendant there who sought a stay of the proceedings in the King's Bench Division on the grounds that the whole cause of action was the subject of an action which was pending in the Chancery Division and this was what his Lordship said at p. 514 of the report:

> I am of opinion that execution must be stayed. It seems clear to me that this is an attempt to defeat what the Court of Appeal held to be the law in *Poulett v. Hill* [1893] 1 Ch. 277. Where two separate remedies are possible, and a start is made by putting in force one of those remedies by a writ which would entitle the plaintiff to the relief he subsequently desires, he cannot by deliberately leaving that out of his claim reserve his right to ask for it in another proceeding. Where proceedings have been started, it is an abuse of the process of the Court to divide the remedy where there is a complete remedy in the Court in which the suit was first started.

[45] Of course, the facts in the above English cases are distinguishable from the facts in our case and that cannot be disputed. But the principles enunciated in these English cases are of universal application.

[46] The circumstances in which a court can find an abuse of process will be explored hereinafter. A rather useful and succinct definition of the term "abuse of process" can be seen in the Privy Council's case of *Hui Chi-ming v. R* [1991] 3 All ER 897 at p. 914 where Lord Lowry said as follows:

> … something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding.

[47] It is said that the doctrine of abuse of process originated in the speeches of the Law Lords in the case of *Connelly v. Director Of Public Prosecutions* [1964] 2 All ER 401, HL, where it was said that a court has the power, inherent in its jurisdiction, to prevent abuses of its process and to control its own procedure, including the power to safeguard an accused from oppression or prejudice.

[48] Twelve years down the road, the doctrine of abuse of process was re-visited by the Lords in *Director of Public Prosecutions v. Humphrys* [1976] 2 All ER 497, HL, where both Lord Salmon and Lord Edmund-Davies endorsed the view that a judge had the necessary power to intervene where a prosecution amounted to an abuse of the process of the court. It must be noted, however, that Viscount Dilhorne dissented from such a proposition. Since *Humphrys*, the existence of this power has been accepted without protest.

[49] Gopal Sri Ram JCA writing for this court in the case of *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 CLJ 340, CA, had this to say in regard to the doctrine of abuse of process (see p. 352 of the report):

> Every person who is aggrieved by some wrong he considers done him is at liberty to invoke the process of the court. Equally may a litigant invoke the process to enforce some claim which he perceives he has against another. When however, the process of the court is invoked, not for the genuine purpose of obtaining the relief claimed, but for a collateral purpose, for example, to oppress the defendant, it becomes an abuse of process. Where the court's process is abused, the proceedings complained of may be stayed, or if it is too late to grant a stay, the party injured may bring an action based on the tort of collateral abuse of process.

[50] And this very passage was cited with approval by this court in *Jasa Keramat Sdn Bhd & Anor v. Monatech (M) Sdn Bhd* [1999] 4 CLJ 533.

[51] In *Ebert v. Venvil And Another, Ebert v. Birch And Another* [1999] 3 WLR 670, CA, [2000] Chancery Division 484, CA, the court there held that the High Court has an inherent jurisdiction to prevent the institution of civil proceedings which are likely to constitute an abuse of the process of the court.

[52] Yong Pung How CJ (Singapore) writing for the Court of Appeal in the case of *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors* [1998] 1 SLR 374, at p. 384 had something to say about the doctrine of abuse of process. This was what he said:

> The term, 'abuse of the process of the Court', in O. 18 r. 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used *bona fide* and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all the relevant circumstances of the case. A type of conduct which has been judicially acknowledged as an abuse of process is the bringing of an action for a collateral purpose, as was raised by the respondents. In *Lonrho v. Fayed (No 5)* [1993] 1 WLR 1489, Stuart-Smith LJ stated that, if an action was not brought *bona fide* for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

[53] Taken objectively, this is a case about an abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people in society.

[54] In my judgment, the abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a "collateral attack" against the triable issue in the plaintiff's writ action that is awaiting trial at the High Court. The originating summons number R2-24-5-2000 was filed oblivious of the pending triable issue that should be fixed for hearing before the High Court. And if that is not an abuse of the process of the court, I do not know what is. According to the case of *Smith v. Linskills (a firm) and another* [1996] 2 All ER 353, CA at p. 358, [1996] 1 WLR 763 at 769, that the word "collateral" means "an attack not made in the proceedings which

gave rise to the decision which it is sought to impugn; not, in other words, an attack made by way of appeal in the earlier proceedings themselves".

[55] With respect, the learned judge of the High Court erred when he gave an order in terms of the plaintiff's originating summons number R2-24-5-2000 without the benefit of a full trial but rather by way of an affidavit evidence notwithstanding the fact that the Court of Appeal had, on 26 February 1997, ordered that the triable issue should proceed for trial before the High Court.

[56] While seating on the High Court bench, I had occasion to dwell at some length in regard to the doctrine of abuse of process. I need only to mention three of those judgments and they are:

(a) *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 2)* [2002] 6 CLJ 6;

(b) *Mohamed Yusop bin Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 7 CLJ 81; and

(c) *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653 at p. 670, and *Multimedia Development Corporation Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 AMR 507 at p. 525.

[57] In *Ganad Media Sdn Bhd v. Dato' Bandar Kuala Lumpur (No 2) (supra)*, I had this to say about the abuse of process (see pp. 16 to 17 of the report):

Abuse of process

In regard to an abuse of process, I have this to say. Since time immemorial, the courts have exercised its powers under the inherent jurisdiction by summary process to terminate proceedings which were frivolous or vexatious or which were an abuse of the process (*Veale v. Warner* [1669] 1 Wms Saund 575; and *Johnson v. Stephens & Carter Ltd & Golding* [1923] 2 KB 857). Way back in 1875, the Court of the Exchequer in the case of *Castro v Murray* [1875] LR 10 Ex 213 – which was an action against the clerk of the petty bag office in the Court of Chancery for refusal to seal a writ of error, decided that it had power to summarily dismiss an action as being an abuse of the process of the court. The Queens Bench Division in 1876 in the case of *Dawkins v. Prince Edward of Saxe Weimar* [1876] 1 QBD 499 – which was an action against members of a military court of inquiry for

damages for conspiracy, dutifully followed the decision of *Castro v. Murray*. Blackburn J, delivering the judgment in *Dawkins v. Prince Edward of Saxe Weimar* aptly said at p 502 of the report:

> Have we, although we see the action is utterly groundless, a right to stop it summarily?

As I see it, once it becomes apparent that the abuse of process becomes a ground for the court to terminate the proceedings summarily under its inherent jurisdiction, then it becomes a solid basis for the court to invoke its inherent powers. At the local scene, the inherent powers of the court finds its way in the Rules of the High Court 1980 ('the RHC') as per O. 92 r. 4 thereof which states as follows:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

Generally speaking, the process of the court must be used properly, honestly and in good faith and it must not be abused. That must surely be the best way to describe the meaning of the term 'abuse of process'. The court will certainly not allow itself to be misused. The court will certainly ensure that its machinery will not be used as a means of vexation or even oppression. It is to prevent the misuse of the legal machinery that the court must be vested with the power to intervene summarily. Once an abuse of process has been detected, the court must intervene to stay or even to dismiss the proceedings and this would be the very essence of justice (see the speech of Lord Blackburn in *Metropolitan Bank v. Pooley* [1885] 10 App Cas 210). The summary process of the court must be vigorously applied to prevent frivolous, vexatious or groundless litigation.

It is an abuse of process where the proceedings are frivolous or vexatious and this would be the typical situation in any given case.

[58] In *Mohamed Yusop bin Abdul Wahab v. American Express (M) Sdn Bhd (supra)*, I made reference to the case of *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 4 CLJ 857 in order to explain the meaning of the term "abuse of process" which was as follows (see pp. 87-88 of *Mohamed Yusop*'s case):

Abuse of the process of the court

It is said that the process of the court must be used *bona fide* and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v. Murray* [1875] 10 Ex 213).

The classifications of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed. Much will depend on all the relevant circumstances and, towards this end, the considerations of public policy and the interests of justice may be relevant and material. Thus, it is an abuse of the process of the court for a party to re-litigate the issue of fraud after it has been tried and decided by an Irish Court (*House of Spring Gardens Ltd v. Waite* [1990] 2 All ER 990). It is also an abuse of the process of the court and the claim will be struck out if it is groundless and unfounded in the sense that the plaintiff does not know any of the facts to support it (*Steamship Mutual Underwriting Association Ltd v. Trollope and Colls (City) Ltd* [1986] 33 Build LR 77 (CA)).

I must at once say that the burden upon an applicant who asks that a writ of summons and the statement of claim to be struck out is a heavy one. It is indeed onerous. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious.

[59] In *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd (supra)*, I referred to the speech of Lord Denning in *Goldsmith v. Sperrings Ltd* [1972] 2 All ER 566 at p. 574 in an attempt to show what judges can do in a given situation in the context of an abuse of process. Allow me to refer to p. 670 of the MLJ report and at p. 525 of the AMR report of the case of *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd (supra)* to illustrate the point:

The principle was explained thus by Lord Denning in *Goldsmith v. Sperrings Ltd* [1972] 2 All ER 566 at p 574:

In a civilised society, legal process is the machinery for keeping order and doing justice. It can be used properly or it can be abused. It is used properly when it is invoked for the vindication of men's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong known to the

A law. The Judges can and will intervene to stop it. They will stay the legal process, if they can, before any harm is done. If they cannot stop it in time, and harm is done, they will give damages against the wrongdoer.

B Sometimes abuse can be shown by the very steps being taken in the Courts, … Again, where a pamphlet contained two different passages, each defamatory of a man, and he brought two separate actions, one for each passage. He failed on the first. The second was stayed. Fry LJ saying: … such successive actions … would be an abuse of the process of the Court …: see *MacDougall v. Knight* … .

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[60] His Lordship Low Hop Bing, JCA rightly said that the plaintiff has embarked on other areas of the law in a rather long written submission. While due accord should be extended to the plaintiff for the scholarship in preparing the long written submission, I am of the considered view that they are not relevant, at this juncture.

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[61] Based on the question that was formulated by his Lordship Low Hop Bing, JCA, I am in entire agreement with the conclusions and orders made by him. And I make those orders accordingly.

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